

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

GENE GILBERT ELLIS,

Petitioner,

No. 2:18-cv-00012-JCH-KRS

v.

RAYMOND SMITH, Warden, and
ATTORNEY GENERAL STATE OF
NEW MEXICO,

Respondents.

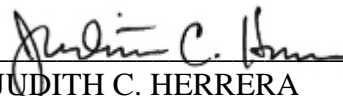
**ORDER ADOPTING PROPOSED FINDINGS
AND RECOMMENDED DISPOSITION, DENYING MOTION FOR STAY AND
ABEYANCE, GRANTING MOTION TO DISMISS UNEXHAUSTED
CLAIM, AND DENYING WITHOUT PREJUDICE
MOTION FOR APPOINTMENT OF COUNSEL**

This matter comes before the Court on Magistrate Judge Kevin R. Sweazea's Proposed Findings and Recommended Disposition ("PFRD") dated July 9, 2018. (Doc. 17). In the PFRD, Judge Sweazea recommended that Petitioner Gene Gilbert Ellis's so-called "mixed" petition under 28 U.S.C. § 2254 for a writ habeas corpus, containing both exhausted and unexhausted claims, be dismissed without prejudice. (*Id.*). The magistrate judge also recommended that Ellis's motion to stay and hold his petition in abeyance be denied. (Doc. 13). In the interest of fairness and to address statute of limitations concerns, the magistrate judge proposed that before dismissing the petition in its entirety, Ellis, at his election, be permitted to voluntarily dismiss the claims he had not exhausted in the state courts. The magistrate judge extended Ellis's deadline to object to the PFRD until September 6, 2018. That date has come and gone, and Ellis has not challenged the PFRD. Nonetheless, in filings dated August 10, 2018, Ellis has indicated his intent to abandon his unexhausted claim. The Court accepts Ellis's election.

Ellis has also moved to appoint counsel. (Doc. 10). “[H]abeas petitioners have no constitutional right to post-conviction counsel,” *Banks v. Workman*, 692 F.3d 1133, 1147 (10th Cir. 2012), and “[t]he decision to appoint counsel is left to the sound discretion of the district court.” *Engberg v. Wyoming*, 265 F.3d 1109, 1122 (10th Cir. 2001). At this stage, the merits of the exhausted claims have not been examined, but it is apparent to the Court from reviewing the briefing that Ellis has thoroughly and intelligibly presented his claims. If in the future, the Court determines that an evidentiary or other hearing is necessary, the Court will revisit Ellis’s request. For now, the Court will deny the motion without prejudice.

IT IS THEREFORE ORDERED that:

- 1) the PFRD (Doc. 17) is adopted as an order of the Court;
- 2) Ellis’s motion for stay and abeyance (Doc. 13) is DENIED.
- 3) Ellis’s motion to withdraw unexhausted claim (Doc. 23) is GRANTED and he may move forward with those claims he exhausted in the New Mexico courts.
- 4) Respondents shall file an amended answer addressing the merits of Ellis’s exhausted claims on or before December 20, 2018. Ellis may file a reply on or before January 7, 2019.
- 5) Ellis’s motion for supplemental information (Doc. 19) is DENIED as moot.
- 6) Ellis’s motion to appoint counsel is DENIED without prejudice.



JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE